93-816

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

BENNIE DEAN HERRING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTIONS PRESENTED

I. WHETHER THE EQUAL PROTECTION CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION EXTEND TO INDIVIDUALS OTHER THAN MEMBERS OF A PARTICULAR RACE OR RELIGION.

A. WAS THE PETITIONER'S EVIDENCE SUFFICIENT TO ENTITLE HIM AN EVIDENTIARY HEARING IN THE DISTRICT COURT?

II. WHETHER THE EXEMPTION CLAUSE (SUBSECTION b) OF TITLE 47 SECTION 605 PROVIDE A DEFENSE TO AN INDIVIDUAL CHARGED WITH AIDING OR ASSISTING A PERSON IN THE UNAUTHORIZED DECRYPTION OF PROGRAMMING DELIVERED BY SATELLITE.

A. SHOULD AN EXPERT WITNESS, WHO WOULD TESTIFY TO THE NON-EXISTENCE OF A MARKETING SYSTEM, AS CONTEMPLATED UNDER TITLE 47 SEC 605(b), BE DISALLOWED?

B. DOES AN ARTIFICIAL PRICING ARRANGEMENT BETWEEN THE PROGRAMMERS CREATE A DEFENSE UNDER SUBSECTION (b)?

III. WHETHER TITLE 47 SEC 605 IS UNCONSTITUTIONALLY VAGUE AS IT APPLIES TO BACKYARD SATELLITE RECEPTION.

A. DOES AN INDIVIDUAL HAVE THE RIGHT TO MONITOR A WIDERANGE BROADCAST SIGNAL?

B. DOES TITLE 47 SEC 605(a) EVEN ATTEMPT TO CRIMINALIZE THE MERE UNAUTHORIZED RECEPTION, FOR PRIVATE USE, OF A RADIO SIGNAL?

C. DOES TITLE 47 SEC 605(e)(4) UNCONSTITUTIONALLY RELATE UNAUTHORIZED DECRYPTION WITH THE UNLAWFUL DIVULGENCE OF A RADIO SIGNAL?

LIST OF INTERESTED PARTIES

Trial Judge: The Honorable Myron Thompson
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Middle District of Alabama
Federal Courthouse
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Montgomery, Alabama 36104

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Appellees: United States Government

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IN THE SUPREME COURT OF THE UNITED STATES

BENNIE D. HERRING,

Petitioner,

VS.

United States of America,

Respondant.

OPINIONS AND ORDERS BELOW

APP-1 Order, of District Court, denying petitioner's right to evidentiary hearing on the issue of selective prosecution;

APP-2 Order, of District Court, allowing release pending appeal;

APP-3 Order, of Appelate Court, affirming judgement;

APP-4 Order, of Appelate Court, denying enbanc consideration.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. 1254 (1). The order of the Eleventh Circuit Court of appeals denying the petitioner's motion for Rehearing En Banc is dated July 30, 1993.

CONSTITUTIONAL PROVISION INVOLVED

THE ACTION OF THE DISTRICT COURT, DENYING THE PETITIONER A DEFENSE UNDER THE EXEMPTION CLAUSE, AND SANCTION OF THAT ACTION BY THE APPELLATE COURT VIOLATED THE PETITIONERS' RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENT. ALSO, THE ISSUES OF BACKYARD SATELLITE RECEPTION,INVOLVED IN THIS CASE, ARE BEFORE THIS COURT FOR THE FIRST TIME.

STATEMENT OF THE CASE

To defend himself of criminal charges under Title 47 Sec 605(e)(4), the petitioner attempted a defense based on; (1) that he was being singled out for prosecution because of anti-cable actions he undertook in response to the scrambling of satellite delivered programming;(2) that the backyard dishowner (including anyone aiding and assisting the backyard dish owner) was exempt from criminal and civil prosecutions under Sec. 605 until the cable companies/programmers met certain conditions outlined under Title 47 Sec 47 605(b); (3) that the 1989 amendment((e)(4)) was unconstitutional in that it related "unauthorized decryption" with receiving and divulging radio signal.

In a pretrial hearing, the petitioner attempted to introduce evidence to support his prima facia case of selective prosecution. The evidence was put before

the District Court in a manner consistent with the procedures established by the 11th Circuit Court of Appeals in other similar cases. The District Court refused to hear the evidence and the Appelate Court affirmed that decision without comment.(App-1)

During the trial of the case the petitioner introduced an expert witness to aid the jury in understanding the undefined term "unauthorized decryption". The expert witness was not allowed to testify even though the government's expert was allowed to testify as to the term "unauthorized decryption". The petitioner's expert testimony as to the marketing system , outlined in subsection(b) of Title 47 Sec 605 , was also not allowed even though the government's testimony, on the same issue, was allowed.

The 11th Circuit Court of Appeals affirmed the District Court's decision without comment even though all the

arguments pro and con were before that court for the first time. Never had there been a Title 47 Sec 605(e)(4) case before that court or any other appelate court. The only court ever to address subsection (b) of this statue was a Kansas court in 1985. That court's understanding of the exemption clause is consistent with the petitioner's and not so with the 11th Circuit.

ARGUMENT

I.

THE EQUAL PROTECTION CLAUSE EXTENDS TO ANY PERSON SELECTED FROM ANY GROUP AND PROSECUTED.

A. The petitioner was precluded from proving selective purpose when the District Court refused to allow testimony from witnesses.

In U.S. vs. Gordon, 817 F 2d 1538, 1539, the 11th Circuit Court of Appeals established a two prong test for a defendant before he would be allowed the defense of

selective prosecution. The first prong requires a defendant to establish he has been singled out for prosecution while others similarly situated have not. The second prong requires the decision be invidious or in bad faith. In David Allen Wayte vs. U.S. 105 Supreme Court Reporter 1524, this Court further specified the elements required before an individual could claim selective prosecution as a defense. This Court recognized the terms "effect" and "purpose". It decided that, even if there was a discriminatory effect, there must also be a discriminatory purpose. In the case at bar, using Gordon as a pattern, the petitioner subpoenaed several witnesses to a pretrial hearing in the District Court. The petitioner also filed several affidavits to be used as evidence at that hearing. These affidavits and witnesses would have produced evidence of the government prosecuting the petitioner while not prosecuting people it

knew were similarly situated. In fact, the petitioner didn't need witnesses to prove the first prong established by the eleventh circuit in Gordon. The prosecuting attorney stated in open court:(1SR-Pg. 16,17)

> "Well, he understands fully why he got selected to prosecute: because he was the person who was selling more of the modifications and selling more of these descramblers than probably anyone else in this district. And that is a proper and appropriate reason for singling him out as one to be prosecuted as opposed to others; in the interest of utilization of resources and so forth in the prosecution of criminal violations."

This court touched on "utilization of resources" in Wayte. It did not require the government to search through 674,000 non-registrants. However, the government did prosecute people who reported themselves

or were reported by others. Nowhere in that opinion did it allow private industry to make the decision as to who would be prosecuted and who would not. Whether the petitioner was a draft dodger, a satellite dealer, or a black Christian voter registrant makes no difference. When a person is selected from any group of similarly situated people and prosecuted he deserves a chance to prove any possible discriminatory purpose of the prosecutor. The prosecutor's statement alone extablished a prima facia case.

In his order denying the motion for an evidentiary hearing, the District Judge ruled: App-1

> In order to merit an evidentiary hearing on a claim of selective prosecution, a criminal defendant must establish, among other things, that the decision to prosecute was based on an invidious classification such as

race or religion."

The District Court went on to rule: App-1

> "Even if Herring is correct in arguing that the government had "no rational basis" to prosecute him and not others similarly situated, he has failed to show that he was singled out for any invidious or otherwise impermissible reason."

The petitioner's witnesses and affidavits would have furnished evidence to the Court that the government prosecuted the petitioner at the direction of private industry and allowed similarly situated people to go unprosecuted at the direction of private industry. When the court refused to hear the witnesses it precluded the petitioner from establishing the second prong set out in Gordon. The petitioner asks this Court to determine if such acts constitute impermissible reasons and proof of selective purpose.

II

THE EXEMPTION CLAUSE OF TITLE 47 SEC. 605 (SUBSECTION b) EXEMPT THE BACKYARD DISH OWNER (INCLUDING ANYONE WHO AIDS OR ASSISTS) FROM PROSECUTION UNDER SECTION 605 UNTIL A GOOD FAITH MARKETING SYSTEM IS ESTABLISHED.

In Air Capital Cablevision, Inc. v. Starlink Communications Group, Inc., 601 F.Supp. 1568 (D. Kansas 1985) a Kansas court stated:

> "The legislative history of the cable act makes it clear that in the absence of encrypted programming or an established marketing system, the manufacture, sale, or distribution of earth satellite stations, satellite dishes, does not violate the act."

Title 47 section 605 was amended in 1984 because people were actually being prosecuted for selling and buying satellite backyard systems. The 1984 amendment

exempted those systems from prosecutions under section 605 until such time as the suppliers of programming encrypted their signal and established a good faith marketing system to market that programming to the backyard dish owner. In the Air Capital case the District Court acknowledged the requirement of encryption and a marketing system.

In the instant case, the petitioner attempted to use the 1984 amendment as a defense. The District Court refused to allow it. That refusal was based in part by a total misunderstanding of the statute by the court and the government's lawyer. In an exchange, between the court, the prosecutor and the petitioner, the court issued this ruling:(R-4-Pg. 149)

> Mr. Niven: He's still misinterpreting subsection b, your honor. Subsection b is

for unencrypted, and even the unencrypted programs could be--it would be unlawful to intercept unencrypted programming if a marketing system is set up for unencrypted programs.

The court: That's right. They don't have to encrypt. But that's it, that's my ruling. Let's move on to something else.

Subsection (b) clearly states the signal must be encrypted. The government in its brief before the district court used even a different interpretation. The government argued:

> "It is clear from the plain language of the statute and the legislative history that the exception only applies to the interception of

unencrypted satellite cable programming."

The 1984 amendment plainly states that the programming must be encrypted and there must be a marketing system established with lawfully designated agents. The District Court determined, there must be either an encryption or a marketing system. The Air Captital court determined there must be both. The District Court misconstrued the 1984 amendment and forced the petitioner to defend himself without the benefit of that amendment. Had the petitioner been allowed to challenge the existence of a marketing system pursuant to the 1984 amendment, the outcome of his second trial might have been different. The petitioner was at least entitled to a defense under that statute. The Air Capital case and the instant case are the only two cases, to this petitioner's knowledge, involving the exemption clause (subsection b). This District Court's opinion that "they don't have to encrypt"

and the opinion in the Air Capital case are in direct conflict and worthy of review by this Court. The Court of Appeals chose not to address the issue.

II

A. AN EXPERT WITNESS, WHO WOULD TESTIFY TO THE NON-EXISTENCE OF A MARKETING SYSTEM, AS CONTEMPLATED UNDER TITLE 47 SEC 605(b), SHOULD BE ALLOWED.

Rule 702 of the Federal Rules of Evidence allows testimony by experts if that testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; a witness may be qualified as an expert by knowledge, skill, experience, training, or education. Rule 703 allows this expert to base his opinion on facts or data, in a particular case, on those perceived by or made known to the expert at or before the hearing. Rule 704 allows an expert to give testimony on the ultimate issue to be decided by the trier of the

fact. The petitioner in this case attempted to use the Honorable Barry Teague as an expert to help the jury determine if a device is authorized or unauthorized and if a person is exempt, pursuant subsection (b) (the exemption clause) to receive a satellite delivered signal with a backyard dish or any related equipment.

Mr. Teague, an attorney and an ex-U.S. attorney, was more knowledgeable about satellite signal legislation and application than any other specially trained person in the Southeast. He had been studying and following the changes in satellite related law since 1987. The term "unauthorized" is not statutorally defined and whether or not a device is capable of unauthorized decryption was the ultimate issue to be decided by the trier of the fact. The petitioner was being charged with selling a device that facilitated unauthorized decryption (aiding and assisting). To

disallow expert testimony on the ultimate issue was a violation of the petitioner's basic rights. Mr. Teague's testimony was based in part on a report introduced to the court.

At the November 7, 1990 hearing, the petitioner introduced a report by the Rural Electrification Association (REA). That report was filed with the Federal Communications Commission (FCC) in March, 1990. A part of that report tells of the cable industry's refusal to put forth a good faith marketing system and the effects of that refusal. Their report stated:

> "The home satellite dish market is not working, high prices, blocked access to programming and other artificial market place distortions caused by the cable industry have fostered rampant signal piracy and threatened to destroy the home dish industry."

The market system referred to in section

605(b)(1)(2) is the same market that is referred to in this report before the FCC. The very purpose of subsection (b) was to require the cable industry to put forth a good faith marketing system. The cable industry owns all major programmers and over 85% of all programmers.

III

TITLE 47 SEC 605(e)(4) IS UNCONSTITUTIONALY VAGUE AS IT APPLIES TO BACKYARD SATELLITE RECEPTION.

Subsection (a) of this title does not attempt to criminalize the reception of a radio signal. It criminalizes the divulgence or retransmission without proper authority. Subsection (e)(4) uses the term "or is intended for any other activity prohibited by subsection (a)" as if the unauthourized decryption of satellite cable programming is prohibited by subsection (a). It attempts to relate "unauthorized decryption" with "unauthorized divulgence".

Title 47 Sec. 605 has never criminalized the reception of a wide range broadcast signal.

In an attempt to balance the rights of satellite programmers and the rights of individuals who want to receive the satellite delivered programming, Congress amended section 605 in 1984. This amendment is sub-section(b). This sub-section states in part: "the provision of sub-section (a) shall not apply to the interception or receipt by any individual, or the assisting (including the manufacture or sell) of such interception or receipt, of any satellite cable programming for private veiwing if the programming is not encrypted and a marketing system is not established under which an agent or agents have been lawfully designated for the purpose of authorizing private veiwing by individuals".

While it is clear that Congress intended to solve the problem of programming delivered to the backyard dish owner, it

failed miserably to indicate a clear concise course for the public to follow. Because of extreme special interest pressure applied to the legislators and becaue of the same pressure being applied to non-legislative committees that are charged with putting into print the final version of new legislation, the outcome of section 605(E)(4) is another attempt to dodge a constitutional issue in the delivery of satellite TV programming. The real issue is whether or not a person has the right to monitor, for his own benefit, the air ways. The Supreme Court recently ruled that if you say something into the open air ways, you have no reasonable expectation of privacy even though your voice is transmitted by a hand held cordless telephone, Tyler v. Berodt, 877 F.2d 705 (1989). Anyone wanting to monitor a conversation held over a cordless telephone, without the authorization of the sender, would

necessarily have to have some kind of a device since any form of electronic communication is unitelligible to the naked ear. A voice or electronic signal transmitted into the air ways by a cordless hand held telephone becomes am omni directional electronic signal, the same as a broadcast transmission from a satellite 22,500 miles above the equator. To monitor an omni directional electronic signal from a cordless telephone, a person would use a device (a modified scanner). To monitor an omni directional electronic signal broadcast from satellite, a person must have a device (a modified General Instrument Videocypher II descrambler). Any distinction would be in the equipment not the type of signal. Both signals penetrate the air space of the individual and neither signal is retransmitted or the contents of such signal divulged.

Enforcement of 605(E)(4) is not about

satellite descramblers or hand held telephones. The enforcement of 605(E)(4) is a direct attempt to change constitutional law in favor of the cable companies. Enforcement of 605(E)(4) takes away the right of a private person to monitor the air ways. By relating "unauthorized decryption" with unauthorized divulgence subsection (e)(4) exceeds the limitations placed on an individual by subsection (a), in that it criminalized the reception of a signal. The decryption of a signal is nothing more than one step in the reception of it. It has nothing to do with retransmission or divulgence which is criminalized by Sec. 605. By prosecuting individuals under sub-section(e)(4) the government is circumventing the exemption clause (sub-section(b)). Even then, private use is excluded until there is an encryption and a marketing system.

Assuming reception does occur then the

communication must not be used for a person's own benefit or for the benefit of another not entitled thereto. Benefit within the context of section 605 requires the using of a communication for financial gain. In 1984, section 605 was amended to exclude private use.

"The term private financial gain shall not inlude the gain resulting to an individual for the private use in such individual's dwelling unit of any programming for which the individual has not obtained authorization for that use". Section 605 (d)(5). Section 605 plainly states that if the communication is used privately in ones own home then it is excluded. No one ever accused the petitioner of selling a device other than one used within the private dwelling by an individual. If it is not a crime to use the signal in ones own home, then a device to capture such signal cannot be in violation

of federal law. If Congress had wanted to criminalize the private reception of broadcast signal, it could have simply used the wording:

> "No person not being entitled thereto shall receive or assist in receiving any electronic signal without the authorization of the sender".

While the government has alleged that the defendant is selling decoders, they have made no allegations that the defendant was selling satellite cable programming. Further, the government has presented no evidence that the defendant has re-broadcast, distributed, or divulged a specific communication. The government contends that the alleged sale of the modified decoder by the defendant constitutes assistance in the unauthorized receipt and use of a communication for the benefit of another not entitled thereto.

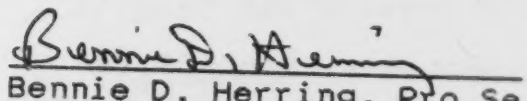
Title 47 Sec. 605 does not criminalize "unauthorized receipt". That term is not used.

CONCLUSION

The petitioner contends his prosecution was a result of his opposition to the current scrambling system employed by the cable companies/programmers. The District Court's failure to allow an evidentiary hearing for Herring to bring out those facts was a denial of his equal protection rights. The District Court denied Herring an evidentiary hearing because he did not allege his prosecution was based on race or religion. The petitioner was denied the right to use the exemption clause under section 605 because the Court misconstrued the law. The misconstruction of law by the District Court was caused by the vagueness of the statue and amendments there to. This appeal of a

conviction under Title 47 section 605(e)(4) is a case of first impression in this country.

Wherefore, this petitioner begs this Honorable Court to review his appeal and give his arguments the same consideration as would be given any other individual, whether or not he is represented by counsel.



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